SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 981

PILOT FREIGHT CARRIERS, INC.,

Petitioner

v.

CHARLES W. WALKER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

PILOT FREIGHT CARRIERS, INC.,

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CHARLES W. WALKER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the parties above-named. And the Petitioner respectfully shows to this Court:

THE OPINION AND THE JUDGMENT IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been printed in the official reports, but may be found in the following

unofficial reports: — 69 LRRM 2916 (1968) and 59 LC ¶9177 (1968). Both the opinion and the dissenting opinion are printed in the Appendix to this Petition.

This case came to the Court of Appeals upon an appeal from the United States District Court for the Western District of North Carolina at Charlotte. The District Court handed down an Order which is printed in the Appendix to this Petition. The order was based upon a Memorandum of Decision in the case of *Johnson v. Seaboard Airline Railroad Company*. This Memorandum of Decision is printed in the Appendix to this Petition and is unofficially reported at 59 LC ¶9176 (1968).

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals was rendered on October 29, 1968. The judgment of that Court was filed on the same date. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. § 1254.

QUESTION PRESENTED FOR REVIEW

Whether the Equal Employment Opportunity Commission, after deciding that reasonable cause exists to believe an employer has violated Title VII of the Civil Rights Act of 1964, is required by Section 706 of that Title to endeavor to resolve the alleged grievance by informal methods of conference, conciliation and persuasion, prior to the institution of Federal Court proceedings.

STATUTORY PROVISIONS INVOLVED

Portions of the Civil Rights Act of 1964, Title VII, which are pertinent to this case, are as follows:

> "(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be

deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

Title VII, Section 706(a),
42 U.S.C. §2000e-5(a)

"(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public im-

portance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance."

Title VII, Section 706(e),
42 U.S.C. §2000e-5(e)

STATEMENT OF THE CASE

On March 15, 1966, Charles W. Walker filed with the Equal Employment Opportunity Commission a complaint of unfair employment practices, alleging that on February 16, 1966 he applied for and was refused work as a long-haul truck driver with Pilot Freight Carriers, Inc. It was alleged that he was refused work because of his race. On July 20, 1966, the Commission issued a finding of reasonable cause to believe the allegations of the charging party. On August 5, 1966, the Acting Director of Compliance, Kenneth F. Holbert, of the Equal Employment Opportunity Commission, wrote to the Company that "a conciliator appointed by the Commission will contact you soon to discuss means of correcting this discrimination and avoiding it in the future." The letter also stated, "Since the charges in this case were filed in the early phases of the administration of Title VII of the Civil Rights Act of 1964, the Commission has been unable to conduct a conciliation during the 60-day period provided in Section 706." On the same date,

August 5, 1966, the Commission wrote to Charles W. Walker stating that "Due to the heavy workload of the Commission, it has been impossible to undertake or to conclude conciliation efforts in the above matter as of this date. However, the conciliation activities of the Commission will be undertaken and continued." The letter also advised Walker that he might institute a civil action in Federal District Court within thirty days.

Contrary to the advice contained in these letters, the Commission made no effort whatsoever at conciliation. No conciliator contacted the Company. On August 24, 1966, Walker filed suit in the Federal District Court. The defendant, Pilot Freight Carriers, Inc., answered in due course and moved to dismiss the action for the reason that no conciliation effort was engaged in by the Equal Employment Opportunity Commission prior to the institution of the action. On January 25, 1968, the District Court entered an order dismissing the complaint of Walker for the reason that Congress intended that conciliation efforts be made prior to the institution of civil actions in Federal Court. From the Order of the District Court, Walker appealed to the United States Court of Appeals for the Fourth Circuit. On October 29, 1968, the Court of Appeals reversed the District Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

This case presents a question of utmost importance which will chart the course and scope of the growth

of a new federal agency — the Equal Employment Opportunity Commission. At stake is whether the Commission will become a hollow formality, through which persons seeking to assert the rights created by Title VII of the Civil Rights Act of 1964 routinely pass on their way to resolution of their asserted grievances in federal court, or whether the Commission will shoulder the primary burden of adjusting the grievances asserted through voluntary procedures prior to, and eliminating the need for, the long drawn out processes of litigation in federal courts.

No question exists of the fact that the framers of the Act intended that the bulk of charges of employment discrimination under the Act be adjusted voluntarily between the Commission and the employer. The Commission was spawned by the fact that parallel state agencies had functioned effectively to solve virtually all such charges under state anti-discrimination legislation. In years of state experience under such laws, only a handful of cases reached the litigation stage.

Unfortunately, however, under the Federal Act, the conciliation duties bestowed upon the Commission by Congress have been ignored, and admittedly so, by the Commission, leaving vast numbers of complaints unresolved. The result is that the lower federal courts have been hit with a deluge of unnecessary litigation contrary to the obvious intent of the law makers to place the primary burden on the Commission to solve employment discrimination grievances.

Many cases stand on the same footing as the instant case — where the Commission made no effort whatsoever to adjust the grievance voluntarily through conference, conciliation and persuasion prior to the institution of federal court proceedings. Conflicting judicial opinions have been given upon this continually recurring issue — should voluntary adjustment through conciliation efforts be attempted before the harsh action of a law suit. This issue should be put to rest by the Court.

ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

Whether conciliation efforts must precede federal litigation has been the subject of at least twenty-five reported opinions in the federal courts within the last two years.[1] Numerous other dispositions of this issue have been made in unreported cases. The results reached have been less than consistent. Compare *Mickel v. South Carolina State Employment Service*, 377 F. 2d 339 (4th Cir. 1967) with *Johnson v. Sea-*

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[1] *Anthony v. Brooks*, — F. Supp. —, 65 LRRM 3074 (N. D. Ga. 1967); *Antonopulos v. Aerojet-General Corp.*, — F. Supp. —, 59 LC ¶9175 (E. D. Cal. 1968); *Blue Bell Boots, Inc. v. E. E. O. C.*, — F. Supp. —, 58 LC ¶9139 (M. D. Tenn. 1968); *Bowe v. Colgate Palmolive Co.*, 212 F. Supp. 332 (S. D. Ind. 1967); *Brown v. Gaston County Dyeing Machine Co.*, — F. Supp. — (W. D. N. C. Mar. 22, 1968), reversed, — F. 2d —, 58 LC ¶9162 (7th Cir. 1968); *Burrell v. Kaiser Aluminum Corp.*, — F. Supp. —, 68 LRRM 3056, 58 LC ¶9156 (E. D. La. 1968); *Choate v. Caterpillar Tractor Co.*, 274 F. Supp. 776 (S. D. Ill. 1967), reversed, — F. 2d —, 58 LC ¶9162 (7th Cir. 1968); *Cox v. United States*

board Air Line Railroad Co., — F. 2d —, 59 LC ¶9177 (4th Cir. 1968). All of the cases, including the one *sub judice*, which allow federal litigation to be initiated prior to efforts to achieve voluntary compliance ignore the plain meaning of the statute, and its legislative history.

Gypsum Co., — F. Supp. —, 58 LC ¶9142 (N. D. Ind. 1968); *Dent v. St. Louis-San Francisco Railway Co.*, 265 F. Supp. 56 (N. D. Ala. 1967), reversed, — F. 2d — (5th Cir. Jan. 8, 1969); *Edwards v. North American Rockwell Corp.*, — F. Supp. —, 58 LC ¶9153 (C. D. Cal. 1968); *Evenson v. Northwest Airlines, Inc.*, 278 F. Supp. 29 (E. D. Va. 1967); *Hall v. Werthan Bag Corporation*, 251 F. Supp. 184 (M. D. Tenn. 1966); *Johnson v. Seaboard Air Line Railroad*, — F. Supp. —, 59 LC ¶9176 (W. D. N. C. 1968), reversed, — F. 2d —, 59 LC ¶9177 (4th Cir. 1968); *Lee v. The Observer Transportation Company*, — F. Supp. — (W. D. N. C., Mar. 22, 1968), reversed, — F. 2d — (4th Cir. Nov. 1, 1968); *Mickel v. South Carolina State Employment Service*, 377 F. 2d 239 (4th Cir. 1967); *Mickel v. South Carolina State Employment Service*, — F. Supp. —, 57 LC ¶9111 (D. S. C. 1968); *Mondy v. Crown Zellerbach Corp.*, 271 F. Supp. 258 (E. D. La. 1967), reversed *sub. nom.*, *Oatis v. Crown Zellerbach Corp.*, — F. 2d —, 58 LC ¶9140 (5th Cir. 1968); *Pena v. Hunt Tool Co.*, — F. Supp. —, 58 LC ¶9123 (S. D. Tex. 1968); *Quarles v. Philip Morris, Inc.*, 271 F. Supp. 842 (E. D. Va. 1967); *Reese v. Atlantic Steel Co.*, — F. Supp. —, 56 LC ¶9096 (N. D. Ga. 1967); *Rosenfeld v. Southern Pacific Co.*, — F. Supp. —, 58 LC ¶9172 (C. D. Cal. 1968); *Sokolowski v. Swift and Co.*, — F. Supp. —, 58 LC ¶9159 (D. Minn. 1968); *Stebbins v. Nationwide Mutual Ins. Co.*, 382 F. 2d 267 (4th Cir. 1967); *Walker v. Pilot Freight Carriers, Inc.*, — F. Supp. — (W. D. N. C. Jan. 25, 1968), reversed, — F. 2d —, 59 LC ¶9177 (4th Cir. 1968); and *Wheeler v. Bohn Aluminum & Brass Co.*, — F. Supp. —, 58 LC ¶9137 (W. D. Mich. 1968).

Writs of Certiorari are being sought in several of these cases, i.e., *Brown v. Gaston County Dyeing Machine Co.*, *supra*, and *Lee v. The Observer Transportation Company*, *supra*.

The Statute

Section 706 is composed of eleven detailed paragraphs setting out the successive steps for the handling of Title VII cases by the Commission. The structure of Section 706 itself establishes the logical conclusion that an attempt to achieve voluntary compliance through conciliation is to precede the institution of the court action. The philosophy of the Act is that as much voluntary compliance as possible should be undertaken and litigation thereby hopefully avoided. Conciliation was designed by Congress to achieve voluntary and willing compliance. If conciliation may be bypassed, then the whole purpose of Congress in requiring it is reduced to an idle gesture.

The language of subsection (a) of Section 706 is clear that if the Commission finds reasonable cause to believe the charge is true it "shall endeavor" to eliminate the practice by "informal methods of conference, conciliation and persuasion." The language of subsection (e) of Section 706 further establishes that *after* this effort is made by the Commission it *then* becomes its duty to report its failure to the aggrieved party who may *then* institute action in Court. Subsection (e) gives the Commission power to extend conciliation beyond thirty days if "further efforts" to secure voluntary compliance are warranted. The words "further efforts" clearly connote that Congress contemplated that initial efforts to conciliate had already gone before. Furthermore, after an action has been commenced in the District Court,

subsection (e) authorizes the Commission to request the Court to stay proceedings pending the "termination" of the efforts of the Commission "to obtain voluntary compliance." This language is further indication that conciliation must have begun before suit is filed.

This conclusion has the support of numerous commentators active in the drafting and administration of Title VII.[1] Professor Sovern of the Columbia Law School and legal consultant to the NAACP Legal Defense and Education Fund, in a treatise on this subject, writes:

> "That the structure of §706, with its linkage of the individual suit to Commission conciliation, leads naturally to the conclusion that the complainant cannot sue until the Commission takes the steps specified, could not have been lost on Congress. . . ."
>
> Sovern, *Legal Restraints on Racial Discrimination in Employment*, 82 (1966)

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[1]Friedman, *Racial Problems & Labor Relations: The Civil Rights Act*, Proceedings of the 18th Annual NYU Conf. on Labor, 373, 376, 380 (1965); Edelsberg, *Title VII of the Civil Rights Act — The First Year*, Proceedings of the 19th Annual Conf. on Labor, 291 (1966); Northrup, *Equal Opportunity & Equal Pay* in Nothrup & Rowan, *The Negro & Employment Opportunity*, 97 (1965); Schermer, *Effectiveness of Equal Opportunity Legislation* in Northrup & Rowan, *supra*, 79 (1965); Administrative Law Section, American Bar Association, 18 Adm. L. Rev. 75, 93 (1966); The Civil Rights Act of 1964, 78 Harv. L. Rev. 684, 693 (1965).

A Justice Department attorney who participated in drafting Title VII and served the Commission as general counsel, explained the Congressional intent as follows:

> "It is the intent of the statute to require the aggrieved person to delay his suit until the Commission has exercised its function of conciliation."
>
> Letter, from Richard K. Berg to the Labor Secretary of the NAACP. See, Berg, *Equal Employment Opportunity under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62 (1964); Berg, *Equal Employment Opportunity: Procedure under Title VII of the Civil Rights Act of 1964*, 55 Illinois B. J. 654 (1967)

The Legislative History

From beginning to end, in both the House and the Senate, the language of Section 706 was explained to provide that a civil action could not be brought prior to efforts by the Commission to achieve voluntary compliance by conciliation. The original bill expressly provided that a civil action could be brought "in advance" of conciliation efforts "if circumstances warrant." This language was eliminated. Representative Celler explained that striking the language would "make certain" that there will be resort to "conciliatory efforts" before court action. 110 Cong. Rec. 2566,

2576 (Feb. 8, 1964). There is agreement on all sides that the bill, as passed by the House, required conciliation efforts to be attempted before the initiation of court proceedings.

The legislative history in the Senate and under the leadership compromise unmistakably reveals that conciliation efforts remained as a prerequisite to suit in the final enactment. The following explanations of the conciliation step were made in the Senate:

> "[A]n aggrieved party may initiate action under the provisions of the bill on a federal level. In such cases, provision is made for Federal conciliation in an effort to secure voluntary compliance with the law prior to court action.
>
> "The point of view of this section is to permit one who believes he has a valid complaint to have it studied by the Commission and settled through conciliation if possible. The Court procedure can follow.
>
> "In Massachusetts, we have had experience with an arrangement of this sort for 17 years and as I recall, approximately 4,700 unfair practice complaints have been brought before our Massachusetts Commission Against Discrimination. Only two of them have been taken to court for adjudication. That procedure is the basis and theory of this part of the bill and that is why I support it."
>
> 110 Cong. Rec. 12690, 14191 (June 4, 17, 1964)(Senator Saltonstall)

"Those of us who have worked upon the substitute package have sought to simplify the administration of the bill . . . in terms of seeking a solution by mediation of disputes, rather than forcing every case before the Commission or into a court of law.

"We have placed emphasis on voluntary conciliation—not coercion.

"The amendment of our substitute leaves the investigation and conciliation functions of the Commission substantially intact.

"Section 706(e) provides for suit by the person aggrieved after conciliation has failed."

110 Cong. Rec. 13088, 14443, 12722-12723 (June 4-9, 1964) (Senator Humphrey)

"[W]e have leaned over backwards in seeking to protect the possible defendants by means of all the procedures referred to—those of conciliation, arbitration, and negotiation."

110 Cong. Rec. 14190 (June 17, 1964) (Senator Morse)

Section 706 was based upon the accumulated experience of twenty-five states which have fair employment practice laws. Senator Javits advised the Senate that conciliation and voluntary compliance worked so well under the state laws that only one case in a thousand ended in court proceedings. 110 Cong. Rec. 13089-13090 (June 9, 1964). The Senate

obviously relied heavily upon these assurances by Senator Javits and Senator Saltonstall that the federal courts would not be flooded with litigation. Only in those states whose laws have the "in advance thereof" clause—which was deleted from the Federal Act —may court action be brought prior to conciliation efforts. See Sovern, *Legal Restraints on Racial Discrimination in Employment*, 24 (1966); Norgren & Hill, *Toward Fair Employment*, 264 (1964); Rosen, *The Law and Racial Discrimination in Employment*, 53 Calif. L. Rev. 729, 778 (1965).

In 1965, Congress was urged to enact a law which would permit litigation in advance of conciliation, but Congress rejected such a proposal. House Rep. No. 718 on H.R. 10065, 89th Cong. 1st Sess. (1965). In 1967, and again in 1968, the Senate Committee on Labor & Public Welfare analyzed and explained that section 706 requires conciliation efforts to be made prior to the beginning of court proceedings. U. S. Department of Labor, Series 6-A (June 1966), Hearings before the Subcommittee on Employment, 90th Cong., 1st Sess. (May 1967), p. 104; and Report of Proceedings of Commitee on S. 1308, published, 67 Labor Relations Reptr. 389, 390.

The opinion filed in this case in the United States Court of Appeals for the Fourth Circuit attempts to brush aside the legislative history as being "not so clear as the defendants would have it." This is a most unusual conclusion, for the opinion's author recently concurred in a decision which stated that the very

same collection of statements of the lawmakers was "overwhelming authority" that Congress had required conciliation efforts to precede litigation. *Mickel v. South Carolina State Employment Service*, 377 F. 2d 329 (4th Cir. 1967). The Fourth Circuit, in *Mickel*, approved the decision in *Dent v. St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56 (N.D. Ala. 1967). It was stated that the *Dent* decision presented a painstaking analysis of the legislative history of Section 706, and the analysis was accepted by the Fourth Circuit as authoritative. Yet, in the instant case, the majority opinion has done an about-face and rejected the very same legislative statements without pointing to any new or differing legislative statements to throw doubt on those statements quoted and relied upon in the *Dent* case.

The only legislative statements pointed to in the majority opinion for doubting the *Dent* analysis were two statements by Senators Humphrey and Javits. But the Court admitted these two statements were not directed to the question here in issue. For that reason, the *Dent* opinion discarded the two statements.

The statement of Senator Javits was directed to a situation where the Commission determines that a charge *is without merit* and therefore does not attempt to obtain voluntary compliance. The statement sheds no light on the present question—the intended procedure when reasonable cause has been found. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M. D. Tenn. 1966); *Dent v. St. Louis-San Francisco Ry. Co.*,

265 F. Supp. 56, 60, fn. 17 (N.D. Ala. 1967). Moreover, the statement by Senator Humphrey was rejected as inaccurate by the Commission's General Counsel, G. C. Op., October 7, 1965, CCH Employment Practices Guide ¶ 17,251.083, see further, Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 63, 83 (1964), and by the Commission in briefs to the Federal Courts, see Brief for the United States Equal Employment Opportunity Commission in the United States Court of Appeals for the Fifth Circuit in Nos. 24810, 24813, *Dent v. St. Louis-San Francisco Ry. Co.* The statement of Senator Humphrey has been so thoroughly discredited that the attorneys for the plaintiff below have not mentioned or relied upon it. Yet, without explanation, the opinion below expressed the inclination to accept this discarded statement as a reason for doubting all the pertinent legislative history.

In summary, the ruling below that complainants may sue prior to conciliation efforts on the part of the Commission is patently contrary to the clearly expressed intent of Congress, in both the House and the Senate. The efforts in the majority opinion to cause doubt of this intent fail completely. It is obvious that the majority opinion of the Court of Appeals for the Fourth Circuit approaches the case with a presumption that the petitioner is guilty, even though the merits have not been tried. See the last paragraph of the majority opinion.

The majority opinion writes the conciliation prerequisite out of the Statute upon the excuse that the Commission has a "heavy workload" and has not been able to carry out its functions. The majority overlooked the fact that there is absolutely nothing in the record of this case to prove any such administrative inability. The Commission did not appear in the District Court. The Commission appeared as *amicus* in the Court of Appeals in the *Seaboard* case, but made no appearance in the instant case and counsel for the petitioner was never advised of any desire on the part of the Commission to appear and was not furnished with any brief or factual assertions of the Commission prior to the hearing of the instant case in the Court of Appeals. Therefore, the petitioner had no opportunity to respond to any assertions of administrative inability made in other cases by the Commission. Furthermore, administrative inability is an amazing argument to address to a court as a ground for ignoring the requirements of a Federal Statute. If Congress has not seen fit to provide additional financial assistance to the Commission, nor to amend the Statute as the Commission may desire it amended, is it within the province of the judiciary to furnish such amendment? It is respectfully submitted that it does not appertain to a judge to grant such indulgences or absolutions from clear and specific enactments of the Legislature.

CONCLUSION

Upon all that is herein set forth, the petitioner earnestly prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit to the end that the Court may review the decision which that Court has rendered in the present case.

Respectfully submitted,

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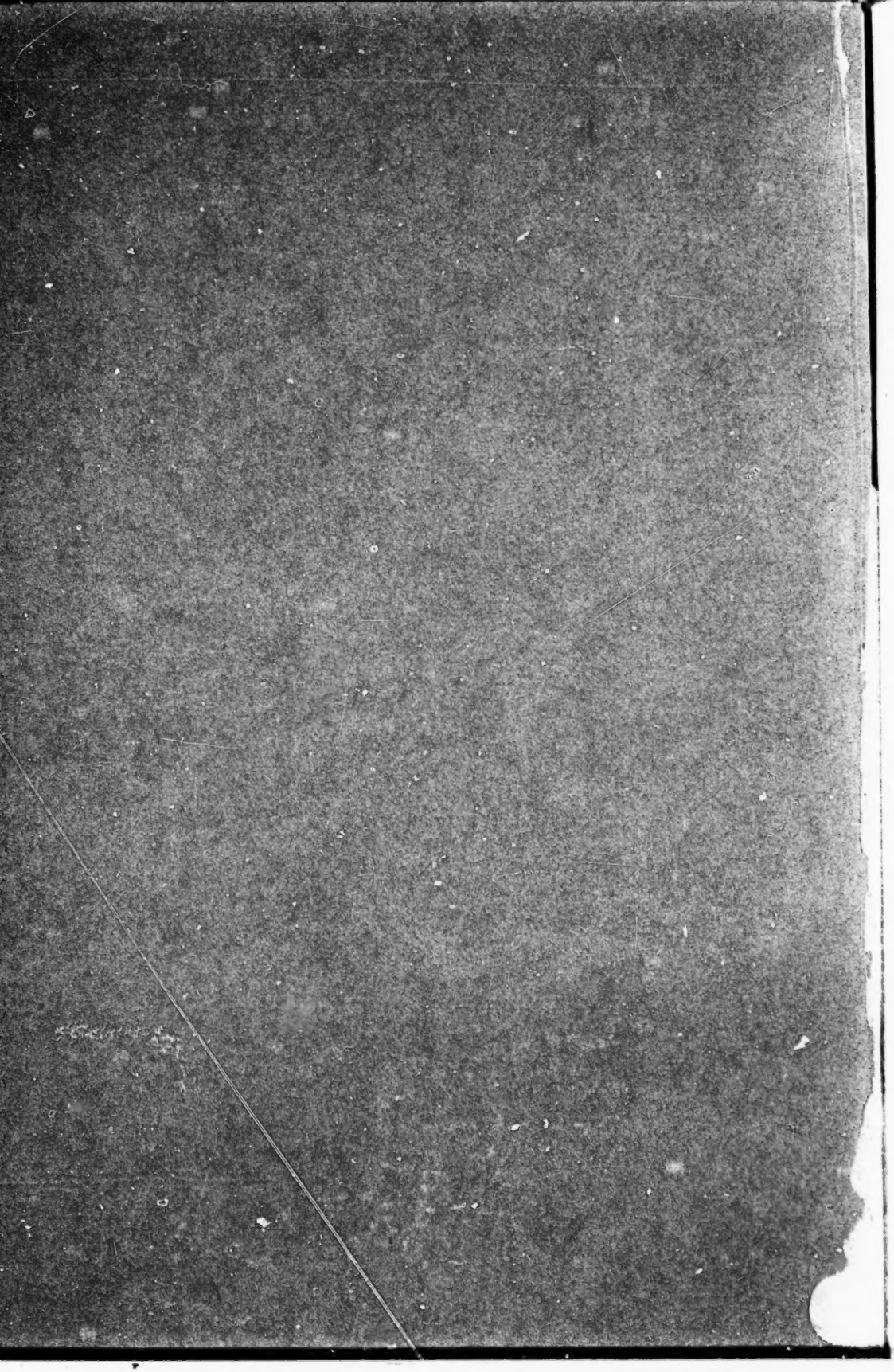

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 12,154

Ray Johnson,
Appellant,

versus

Seaboard Air Line
Railroad Company,
Appellee.

NO. 12,155

Charles W. Walker,
Appellant,

versus

Pilot Freight Carriers, Inc.,
Appellee.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.
Woodrow Jones, District Judge.

(Argued May 9, 1968. Decided October 29, 1968.)

Before BOREMAN, WINTER and CRAVEN, Circuit Judges.

Robert Belton (Jack Greenberg, James M. Nabrit, III, Gabrielle A. Kirk, J. LeVonne Chambers, Conrad O. Pearson, Joseph W. Bishop, Jr., Albert Rosenthal and Sanford Jay Rosen on brief) for Appellants; Thomas Ashe Lockhart and W. Thomas Ray (John S. Cansler; Cansler & Lockhart, and John W. Weldon on brief) for Appellee in No. 12,154; Brown Hill Boswell (J. W. Alexander, Jr., and Blakeney, Alexander & Machen on brief) for Appellee in No. 12,155, and Russell Spector, Senior Attorney, Equal Employment Opportunity Commission (Kenneth F. Holbert, Acting General Counsel, David R. Cashdan, Attorney, Equal Employment Opportunity Commission; John Doar, Assistant Attorney General, David L. Norman, Elihu E. Leifer, Attorneys, Department of Justice, and Macon L. Weaver, United States Attorney, on brief) for Equal Employment Opportunity Commission as Amicus Curiae.

CRAVEN, Circuit Judge:

Whether an actual attempt by the Equal Employment Opportunity Commission to eliminate an unlawful employment practice is a jurisdictional prerequisite to a suit by an individual plaintiff[1] under Title

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[1]The district court did not consider the question of whether and to what extent an individual might prosecute a class action. We thus express no opinion on the question. *Compare Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 187-88 (M.D. Tenn. 1966), *with Mondy v. Crown Zellerbach Corp.*, 271 F. Supp. 258, 264-66 (E.D. La. 1967).

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) is the question presented by these appeals. We think not and reverse the orders of the district judge granting the defendants' motions to dismiss.

Ray Johnson, on January 14, 1966, filed a charge of employment discrimination with the Commission against Seaboard Coast Air Line Railroad Company. The Commission's investigation of the charge showed that Johnson, who had been employed by Seaboard as a porter from 1940 to 1965, was dismissed, ostensibly because of a conviction for a misdemeanor; that the offense occurred while Johnson was off duty and not on Seaboard's property and occasioned no loss of time from his job; that Johnson had written letters protesting Seaboard's racial discrimination to the President's Committee on Equal Employment, the National Railroad Adjustment Board, and the United States Attorney General; and that Seaboard's agents were uncooperative when questioned by the Commission's investigator about company practices and regulations used to discipline white employees and about conduct standards used for Seaboard's employees generally.[2] On the basis of these findings, the Commission determined, on July 18, 1966, that there was reasonable cause to believe that Seaboard had vio-

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[2]The superintendent of Seaboard's Georgia Division indicated that disciplinary records were not available for inspection by the Commission's investigator, 42 U.S.C. § 2000e-8(a) provides that "the Commission * * * shall have access to * * * any evidence of any person being investigated * * * that relates to unlawful employment practices * * * and is relevant to the charge under investigation."

lated Title VII in dismissing Johnson. On August 8, 1966, the Commission notified Johnson by letter that due to its heavy work load it had been "impossible to undertake or to conclude conciliation efforts," but that he was entitled to institute a civil action within 30 days of receipt of the letter.[3] Johnson filed his complaint in the District Court for the Western District of North Carolina on September 7, 1966.

The facts in No. 12,155 are substantialy similar. Charles Walker filed his charge with the Commission on February 28, 1966, and amended it on March 15, 1966. On July 20, 1966, the Commission determined

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[3]The text of the Commission's letter to Johnson is as follows:

"Due to the heavy workload of the Commission, it has been impossible to undertake or to conclude conciliation efforts in the above matter as of this date. However, the conciliation activities of the Commission will be undertaken and continued.

"Under the provisions of Section 706(e) of Title VII of the Civil Rights Act of 1964, the Commission must notify you of your right to bring an action in Federal District Court within a limited time after the filing of a complaint.

"This is to advise you that you may, within thirty days of the receipt of this letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney, the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without payment of fees, costs or security. If you deckle to institute suit and find you need such assistance, you may take this letter, along with the enclosed Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and to request that a Federal District Judge appoint counsel to represent you.

"Please feel free to contact the Commission if you have any questions about this matter."

that reasonable cause existed in Walker's case also, basing the decision on its investigation which showed that Walker's application to Pilot Freight Carriers, Inc. for employment as an over-the-road truck driver was denied; that no Negroes were currently employed by Pilot and had been employed in the past only in casual positions; that Pilot hired five drivers after Walker's application was denied; that of the five, two had applied after Walker, and only one of the five met the company's employment qualifications; and that Pilot made no effort to determine Walker's qualifications. A letter, similar in all respects to the one sent Johnson, was mailed to Walker by the Commission on August 5, 1966, and on August 23, 1966, Walker filed his complaint.

On the basis of a memorandum of decision filed January 25, 1968, the District Court for the Western District of North Carolina dismissed the complaints of both Johnson and Walker on the sole ground that "Congress intended that conciliation efforts be made prior to the institution of civil actions and that this is a jurisdictional prerequisite to the right to file a civil action."

It seems clear to us that the statute, on its face, does not establish an attempt by the Commission to achieve voluntary compliance as a jurisdictional prerequisite. Quite obviously, 42 U.S.C. § 2000e-5(a) does charge the Commission with the duty to make such an attempt if it finds reasonable cause, "but it does not prohibit a charging party from filing suit

when such an attempt fails to materialize."[4] *Mondy v. Crown Zellerbach Corp.*, 271 F. Supp. 258, 262 (E.D.La. 1967). Subsection (e), which contains the authorization for civil actions, provides only that the action may not be brought unless "the Commission had been unable to obtain voluntary compliance."[5]

The defendants argue that Section 2000e-5 must be read as a whole and that, so read, the use of the

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[4] 42 U.S.C. § 2000e-5(a):

"Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred * * * that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization . . . with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

[5] 42 U.S.C. § 2000e-5(e):

"If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice * * *."

word, "unable," in subsection (e) implies that the duty imposed by subsection (a) must be fully performed before a civil action is authorized. We do not agree. "Unable" is not defined by statute to give it a narrow or special meaning. We think "unable" means simply unable—and that a commission prevented by lack of appropriations and inadequate staff* from attempting persuasion is just as "unable" to obtain voluntary compliance as a commission frustrated by the recalcitrance of an employer or a union. *Contra, Dent v. St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56, 61 (N.D.Ala. 1967). At most, we think, a reading of the two sections together means only that the Commission must be given an opportunity to persuade before an aggrieved person may resort to court action. *See Stebbins v. Nationwide Mut. Ins. Co.*, 382 F. 2d 267 (4th Cir. 1967); *Michel v. South Carolina State Employment Serv.*, 377 F. 2d 239 (4th Cir. 1967).

If the plain language of the statute will not support their contention, the defendants, relying heavily on *Dent v. St. Louis-San Francisco Ry. Co.*, *supra*, urge that its legislative history shows a congressional intent to require that civil actions under Title VII be preceded by informal efforts to achieve voluntary com-

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*During the first six months of the Commission's operation more than 1,500 charges said to merit investigation were culled from the several thousand that were filed. At that time the Commission had fewer than 20 full time investigators and only two full time conciliators. At the present time, 1,400 charges are awaiting investigation, and 375 cases are awaiting conciliation. *See* Rowen, Book Review, 81 Harv. L. Rev. 276 at 282 and 286 n. 33 (1967).

pliance. However, the legislative history is not so clear as the defendants would have it. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D.Tenn. 1966). The bill underwent extensive revisions culminating in a leadership compromise,[7] and "a cogent explanation of the policies underlying the compromise was never offered." Comment, 32 U. Chi. L. Rev. 430, 432 (1965).

Our examination of the bill's history indicates that either side can find statements that, taken out of context, support their position.[8] For example, during the debate that we regard as most enlightening on the issue at hand, totally inconsistent explanations of the bill were offered by its proponents and its opponents. Senator Ervin remarked,

> "It may not mean anything to the Senator from New Jersey [Mr. Case] but the bill certainly puts the key to the courthouse door in the hands of the Commission. This is true because the aggrieved party cannot sue in the Federal courts unless the Commission first finds that there is reasonable

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[7] "As with any new statute, Title VII leaves many questions unanswered. They are especially abundant in the procedural area because of the last minute creation of a new enforcement system for Title VII as the basis for the so-called 'leadership compromise' necessary to obtain Republican votes for Senate cloture over debate on the entire Civil Rights Act." Walker, Title VII: Complaint and Enforcement Procedures and Relief and Remedies, 7 B.C. Ind. & Com. L. Rev. 495, 523-24 (1966).

[8] The court in *Mondy v. Crown Zellerbach Corp.* reached the same conclusion. 271 F. Supp. 258, 262 (E.D.La. 1967).

cause to believe the charge is true and then fails to adjust the matter by conciliation."

110 Cong. Rec. 14188 (1964). Apparently in reply to Senator Ervin, Senator Javits said,

"The fatal defect of the amendment is that the provision it would amend is not the key to the courtroom door, because the Commission does not have to find that the complaint is a valid one before the complainant individually can sue * * *. The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation. * * *

"But Mr. President, that is not a condition precedent to the action of taking a defendant into court. A complainant has an absolute right to go into court, and this provision does not affect that right at all."

Id. at 14191. And Senator Humphrey's opinion was, "The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court." *Id.* at 14188.

Such diversity of opinion, without more, destroys defendants' contention that the legislative history compels their interpretation of the Act. Moreover, none of these statements were directed to the jurisdictional question. They were, instead, directed to Senator Ervin's amendment No. 590 which was designed to strike out that portion of Title VII that per-

mits a member of the Commission to file a charge of discrimination against an employer.[9] Senator Ervin's argument was that this provision entrusted the Commission with the roles of both prosecutor and judge; the opponents of the amendment argued that since the Commission was empowered only to determine probable cause, no due process problem would be occasioned by this dual role. It was in reply to that argument that Senator Ervin, in an effort to point out that the Commission's power was not so minimal as the bill's proponents suggested, made the statement quoted above. No one's attention was more than tangentially directed to the problem of jurisdictional prerequisites for a civil action.[10] If we were compelled to choose among the statements, we would be more inclined to accept the statements of Senators Humphrey and Javits, indulging the inference that those who voted with them to defeat the amendment must have understood the bill in the same manner as they.

The defendants also rely on an amendment[11] offered by Representative Celler designed to "make it

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[9]This provision is now found in 42 U.S.C. § 2000e-5(a).

[10]No issue more closely in point was debated after the compromise version of the bill was presented to the Senate, perhaps because debate was severely limited shortly thereafter when cloture was invoked.

[11]The bill as originally presented to the House of Representatives, expressly provided that a civil action could be brought in advance of conciliation efforts if warranted by the circumstances. Representative Celler's amendment deleted the language, "or in advance thereof if circumstances warrant."

clear that an attempt would have to be made to conciliate * * * before an action could be brought in the district court." 110 Cong. Rec. 2566 (1964) (remarks of Rep. Celler). However, at the time this amendment was adopted, the "enforcement provisions of Title VII were patterned after the provisions of the National Labor Relations Act: the Equal Employment Opportunity Commission was to have authority to issue cease-and-desist orders and to seek enforcement of those orders in the courts, and the emphasis was upon protection of the public interest and upon obtaining broad compliance with the provisions of the title." *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966). Subsequently, the Commission's powers of enforcement were deleted from the statute and the "emphasis shifted toward the vindication of individual rights and the burden of enforcement shifted from the Commission to the 'person aggrieved.'" *Ibid. See also*, Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 85-86 (1964-65). We think that the shift in emphasis deprives the Celler amendment of much of the weight which we would otherwise accord it. *Contra, Dent v. St. Louis-San Francisco Ry. Co., Supra* at 59.

We have not ignored statements made in Congress after the shift had occurred. While we concede that these statements place heavy emphasis on the desirability of voluntary compliance, we think that they fall far short of establishing congressional intent that

actual conciliatory efforts by the Commission are a jurisdictional prerequisite to initiating court action.[12]

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[12]Ambiguous as the statements seem to us, we reprint them here out of fairness to the defendants:

"We have leaned over backwards in seeking to protect the possible defendants by means of all the procedures referred to—those of conciliation, arbitration, and negotiation." 110 Cong. Rec. 14190 (remarks of Senator Morse).

"If efforts to secure voluntary compliance fail, the person complaining of discrimination may seek relief in a federal district court." *Id.* at 12617 (remarks of Senator Muskie).

"An aggrieved party may initiate action under the provisions of the bill on a federal level. In such cases, provision is made for Federal conciliation in an effort to secure voluntary compliance with the law prior to court action." *Id.* at 12690 (remarks of Senator Saltonstall).

"The point of view of this section is to permit one who believes he has a valid complaint to have it studied by the Commission and settled through conciliation if possible. The Court procedure can follow.

"In Massachusetts, we have had experience with an arrangement of this sort for 17 years and as I recall, approximately 4,700 unfair practice complaints have been brought before our Massachusetts Commission Against Discrimination. Only two of them have been taken to court for adjudication. That procedure is the basis and theory of this part of the bill and that is why I support it." *Id.* at 14191 (remarks of Senator Saltonstall).

"Those of us who have worked upon the substitute package have sought to simplify the administration of the bill * * * in terms of seeking a solution by mediation of disputes, rather than forcing every case before the Commission or into a court of law.

* * * *

"We have placed emphasis on voluntary conciliation—not coercion.

* * * *

"The amendment of our substitute leaves the investigation and conciliation functions of the Commission substantially intact.

* * * *

"Section 706(e) provides for suit by persons aggrieved after conciliation has failed." *Id.* at 12722-23 (remarks of Senator Humphrey).

Indeed two of the remarks relied on were made during the course of the debate on Senator Ervin's amendment No. 590, referred to above.[13]

However unclear the statute and its history are with respect to the jurisdictional problem at hand, the policies and purposes of the Act are clearly discernable.[14] There can be no doubt that Congress intended to attack the problem of discriminatory employment practices by first seeking voluntary compliance by the nation's employers. But neither can there be any doubt that Congress intended the remedies provided to be timely and effective. Thus, subsections (b) and (c) of 42 U.S.C. § 2000e-5 allow the individual aggrieved or the Commission to proceed after state authorities have been given 60 days in which to act. And subsection (e) allows the Commission to give an aggrieved individual notice of his right to file a civil action when it has been unable within

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[13]For a more thorough analysis of the statute's legislative history, see Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431 (1966).

[14]The report of the House Committee on the Judiciary stated,

"The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin * * *.

"Section 701(a) sets forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination."

H. R. Rep. No. 914, 88th Cong., 2d Sess. (1964). *See also*, 42 U.S.C. §2000e (b).

30 days to achieve voluntary compliance.[18] Obviously, to the extent these policies conflict they must be reconciled in light of the statute's over-riding purpose. To give ample scope to the policy in favor of voluntary compliance, we have held, and now affirm, that the Commission can not be bypassed entirely. *Stebbins v. Nationwide Mut. Ins. Co.*, 382 F.2d 267 (4th Cir. 1967); *Mickel v. South Carolina State Employment Serv.*, 377 F.2d 239, 241 (4th Cir. 1967). To give ample scope to the policy in favor of timely remedial action, we now hold that the individual aggrieved may file a suit in the district court when he has received the statutory notice from the Commission and that he need not await an actual attempt by the Commission to achieve voluntary compliance. *Mondy v. Crown Zellerbach Corp.*, 271 F. Supp. 258 (E.D.La. 1967); *Moody v. Albermarle Paper Co.*, 271 F. Supp. 27 (E.D.N.C. 1967); *Quarles v. Philip Morris, Inc.*, 271 F. Supp. 842 (E.D. Va. 1967); *see Evan-*

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[18]Although we have pointed out the danger in relying too heavily on the rather chaotic legislative history of this bill, we think it worth mentioning in passing that the policy in favor of timely relief was present early in the bill's history. The Republican members of the House Committee on the Judiciary stated in their addendum to H. R. Rep. No. 914, 88th Cong., 2d Sess. (1964), "As the title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement, we believe that settlement of complaints will occur *more rapidly and with greater frequency*." (Emphasis added.)

son v. Northwest Airlines, Inc., 268 F. Supp. 29 (E.D. Va. 1967); *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966); *Contra, Dent v. St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56 (N.D. Ala. 1967); *see Choate v. Caterpillar Tractor Co.*, 274 F. Supp. 776 (S.D.Ill. 1967).

In *Quarles v. Philip Morris, Inc.*, 271 F. Supp. 842 847 (E.D. Va. 1967), Judge Butzner said:

"The plaintiff exhausted administrative remedies and satisfied the requirements of the Act by filing a compliant with the Commission and awaiting its advice. He is not required to show that the Commission has endeavored to conciliate. To insist that he do so, would require him to pursue an administrative remedy which may be impossible to acheive. If the Commission makes no endeavor to conciliate, the remedy is ineffective and inadequate.

"In this circuit the rule is clear. Judge Sobeloff wrote, in Marsh v. County School Bd. of Roanoke Co., Va., 305 F.2d 94, 98 (4th Cir. 1962):

"The requirement that a plaintiff shall exhaust his administrative remedies before applying for judicial relief presupposes that the remedy to which he is referred is an effective one. As we said in McCoy v. Greensboro Board of Education, 283 F.2d 667, 670 (4th Cir. 1960), "It is well settled that administrative remedies need not be sought if they are inherently inadequate or are applied in such a manner as in effect to deny the petitioners their rights."' "

The shift in the Congress from a rationale of national official enforcement to a policy of private individual vindication is, we think, of controlling importance.[10] While the emphasis of the bill was on protection of the public interest, a greater emphasis on voluntary compliance was reasonable. But with the present emphasis on private vindication of individual rights, fairness to an aggrieved individual demands that timeliness assume a greater importance and excessive delays cannot be justified.[11]

There is no corresponding unfairness to employers or unions for the reason that there is no right to

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[10] "Probably the most significant change made in Title VII by the leadership compromise was to deprive the Equal Employment Opportunity Commission of the right to bring suits to enforce compliance with the title and to substitute an individual right of action by the person aggrieved. * * * * This represented a rather basic change in the philosophy of the title and implied an appraisal of discrimination in employment as a private rather than a public wrong, a wrong, to be sure, which entitles the damaged party to judicial relief, but not one so injurious to the community as to justify the intervention of the public law enforcement authorities." Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 67 (1964-65).

[11] Perhaps this is a partial answer to the argument made by the court in *Dent* and by the defendants in this court that since the Dirksen compromise involved a "softening" of the enforcement provisions, it is "contrary to logic to construe this measure as permitting the institution of a civil action without conciliaton and thus providing less protection to potential defendants and as placing less emphasis on voluntary compliance than did the House bill." *Dent v. St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56, 59 (N.D.Ala. 1967). The fallacy in the "contrary to logic" argument is that it ignores the greater need for individual access to the courts where private vindication is the substituted sanction and considers only the impact upon defendant employers and unions.

persist in invidious discrimination. All that defendants ask is not to be sued before being persuaded to comply with the law. They can, of course, do so without persuasion, or may be persuaded to do so without resort to the complaint procedure.[18]

REVERSED

BOREMAN, Circuit Judge, dissenting:

With due respect for the opinions of my brothers I find myself in disagreement with them in these cases. Accordingly, I record my views in this separate statement.

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[18]Indeed, Franklin D. Roosevelt, Jr., Chairman of the Commission, has pointed out that the complaint procedure is not to be relied upon as the most effective means of achieving the statutory purpose:

"To assist businesses throughout the country in establishing and carrying forward an affirmative action program on a community-wide basis, the Office of Technical Assistance, which is the educational and promotional arm of the Commission, has prepared a step-by-step plan, based on established and successful programs. In an effort to broaden business participation, Technical Assistance has scheduled a 'Sixty-City Plan,' calling for regional meetings with small groups of business leaders on the community level during the coming months. The purpose is to counsel and guide these leaders in forming Merit Employment Councils in their respective communities and to cooperate with them in establishing equal employment programs. Meetings are being held in key cities throughout the country and are expected to draw businessmen from surrounding communities. A traveling field staff will follow up on the meetings, contacting the participants for reports of progress and offering solutions to the problems which they may face.

"It is our hope that through persuasive and aggressive promotion of affirmative action we may be able to achieve more significant results, both quantitative and qualitative, for minority group workers than through the complaint procedure."

7 B.C. Ind. & Comm. L. Rev. 413-14 (1966).

The statutes here principally involved (Title VII, § 706, 42 U.S.C. § 2000e-5, subsections (a) and (e), are set out in footnotes numbered 4 and 5 of the majority opinion. There is no need to reproduce them here. The majority view is that the "statute, on its face, does not establish an attempt by the Commission to achieve voluntary compliance as a jurisdictional prerequisite" to the bringing of a civil action by a person allegedly aggrieved.

In each of these cases the Commission admittedly made no effort whatsoever to eliminate the alleged unlawful employment practice by the informal methods prescribed by statute. The only reason assigned by the Commission for such failure was its "heavy work load." By this simple expedient the Commission sought to bypass the clear provisions of the statute, to render them meaningless and thereby open the floodgates to the judiciary when the obvious intent of the lawmakers, as indicated by the language of the statute and the legislative history, was to place the primary burden on the Commission, to protect employers and other persons subject to the provisions of the statue from subjection to the burden of frivolous claims and demands, and to protect the courts from the anticipated deluge of civil actions to enforce the newly-created statutory civil rights.

It is elementary that the fundamental purpose of conciliation is to avoid litigation. In these cases appellants (hereafter plaintiffs) would have the court adopt the unnatural view that conciliation may *follow* litigation at the election of a litigant. Undeniably, if

conciliation is to *follow* litigation then its whole purpose is defeated and the effort of Congress to require it prior to litigation is reduced to an idle gesture. This point is clearly manifested in the wording of the statute and it was recited again and again in the legislative history as will be later noted. Plaintiffs seek to persuade the court to read and construe subsection (e) standing alone and not in conjunction with subsection (a). That argument entirely overlooks subsection (a) as well as other pertinent language in subsection (e). The language of subsection (a) of section 706 is clear that if the Commission finds reasonable cause to believe the charge is true it *shall endeavor* to eliminate the practice by "informal methods." The language of subsection (e) of section 706 further establishes, as the court below stated, that *after* this effort is made by the Commission it *then* becomes its duty to report its failure to the aggrieved party who may *then* institute action in court. Subsection (e) gives the Commission power to extend conciliation beyond thirty days if *further efforts* to secure voluntary compliance are warranted. The words "further efforts" clearly connote that Congress contemplated that initial efforts to conciliate had already gone before. Furthermore, after an action has been commenced in the district court, subsection (e) authorizes the Commission to request the court to stay proceedings pending the *termination* of the efforts of the Commission "to obtain voluntary compliance." This language is further proof that conciliation efforts must have begun before suit is filed.

Applying elementary rules of statutory construction, section 706 must be read as a whole in order to ascertain its true meaning. Each part or section should be construed in connection with every other part or section to produce a harmonious whole.[19] Reading subsections (a) and (e) together, I reach the conclusion that conciliation efforts *must* precede suit. This conclusion was reached by Professor Sovern of the Columbia Law School and Legal Consultant to the NAACP Legal Defense and Education Fund. As he stated in a treatise on this subject:

> "That the structure of § 706, with its linkage of the individual suit to Commission conciliation, leads naturally to the conclusion that the complainant cannot sue until the Commission takes the steps specified, could not have been lost on Congress * * *."[20]

In analyzing the language of the statute the court in *Dent v. St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56, 62 (N.D. Ala. 1967), stated:

> "* * * It not only speaks of 'the termination' of conciliation but was likewise explained in Congress as authorizing a stay pending 'further efforts at conciliation by the Commission,' [110 Cong. Rec.

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[19]2 Sutherland, Statutory Construction, § 4703; Mastro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 285 (1956); National Labor Relations Board v. Lion Oil Co., 352 U.S. 282, 288 (1957).

[20]Sovern, Legal Restraints on Racial Discrimination in Employment, 82 (1966).

15866 (July 2, 1964)] and it therefore is to authorize a stay for the termination or continuation of conciliation efforts, not for their initiation."

In referring to subsection (e) and noting that the Commission has up to sixty days to attempt to secure voluntary compliance the following statement appears in the Harvard Law Review:

> "Only after this effort has failed may the aggrieved person bring an action for relief, and even then the court may, upon request, stay proceedings for up to 60 additional days pending * * * the *further* efforts of the Commission to obtain compliance." (Emphasis added.)[21]

The passage of this civil rights legislation and the statutory provisions pertinent here was accomplished only after much debate, after amendments were proposed and material changes made which differed from the original proposals. "Seldom has similar legislation been debated with greater consciousness of the need for "legislative history" or with greater care in the making thereof, to guide the courts in interpreting and applying the law."[22]

In both the House and Senate, it was explained that a civil action could not be brought without *efforts* to achieve voluntary compliance by conciliation. The

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[21]The Civil Rights Act of 1964, 78 Harv. L. Rev. 684, 693 (1965).

[22]Vaas, Title VII; Legislative History, 7 Boston College L. Rev. 431, 444 (1966).

House Labor Committee Report explained that "maximum efforts be concentrated on informal and voluntary methods of eliminating unlawful employment practices before commencing formal procedures." Representative Lindsay, then a member of the House Judiciary Committee, explained that "the procedures are carefully spelled out. * * * Those procedures are designed to give due protection to everyone. They command that there first be voluntary procedures.[23] He added that "unless this voluntary procedure is complied with, nothing further can happen."[24]

On at least two occasions Congress thoroughly considered and then rejected proposals that litigants be permitted to proceed with court action before conciliation was attempted. Thus, the original bill expressly provided that a civil action could be brought "in advance" of conciliation efforts "if circumstances warrant," but these clauses were eliminated "to make certain" that there be resort "to conciliatory efforts" before court action.[25]

The bill was passed by the House as amended and the amendment, eliminating the "in advance" clause, was explained by Representative O'Hara:

"There were some who believed that perhaps the language, as it stood, would authorize bringing the

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[23]110 Cong. Rec. 1638, 2565 (Feb. 1, 8, 1964).

[24]110 Cong. Rec. 2565 (Feb. 8, 1964).

[25]110 Cong. Rec. 2566, 2576 (Feb. 8, 1964) (Rep. Celler, Chairman of the House Judiciary Committee).

action in court before any attempt had been made to conciliate. We thought that striking the language would make it clear that an attempt would have to be made to conciliate in accordance with the language * * * before an action could be brought in the district court."[26]

Further evidence of intent is found in the fact that in 1965 Congress again was urged to enact a law which would permit litigation "in advance" of conciliation.[27] Again Congress rejected this proposal. It seems to me perfectly clear that the plaintiffs are here seeking by court decree to acquire precisely that which legislative proponents sought and failed to get from the Congress.

The plaintiffs concede in their brief that conciliation efforts were a prerequisite to a civil action under the bill as passed by the House. But they argue that the conciliation prerequisite was eliminated by the Dirksen compromise in the Senate. To support this argument they point to the fact that the compromise substituted the "person aggrieved" for the Commission as the party authorized in the original proposal to bring the civil action. This argument is in "patent disregard for the fact that the procedure under the compromise was explained [in the Senate], just as was the House Bill, as authorizing the institution of a civil action only after conciliatory efforts by the Com-

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[26]110 Cong. Rec. 2566 (Feb. 8, 1964).

[27]House Rep. No. 718 on H.R. 10065, 89th Cong., 1st Sess., 1965.

mission.[28] As to the conciliation step, it was explained in the Senate:

> "[W]e have leaned over backwards in seeking to protect the possible defendants by means of all the procedures referred to — those of conciliation, arbitration and negotiation."[29]

> "If efforts to secure voluntary compliance fail, the person complaining of discrimination may seek relief in a federal district court."[30]

Senator Saltonstall explained his support of the proposed legislation as follows:

> "[A]n aggrieved party may initiate action under the provisions of the bill on a federal level. In such cases, provision is made for Federal conciliation in an effort to secure voluntary compliance with the law *prior to court action.*

> "The point of view of this section is to permit one who believes he has a valid compiaint to have it studied by the Commission and settled through conciliation if possible. The Court procedure can follow.

> "In Massachusetts, we have had experience with an arrangement of this sort for 17 years and as I recall, approximately 4,700 unfair practice com-

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[28]Dent. v. St. Louis-San Francisco Ry. Co., 265 F. Supp. 56, 59-60 (N.D. Ala. 1967).

[29]110 Cong. Rec. 14190 (June 17, 1964) (Senator Morse).

[30]110 Cong. Rec. 12617 (June 3, 1964) (Senator Muskie).

plaints have been brought before our Massachusetts Commission Against Discrimination. Only two of them have been taken to court for adjudication. That procedure is the basis and theory of this part of the bill and that is why I support it."[31] (Emphasis above supplied.)

Senator (now Vice President) Humphrey made the following statements:

"Those of us who have worked upon the substitute package have sought to simplify the administration of the bill * * * in terms of seeking a solution by mediation of disputes, rather than forcing every case before the Commission or into a court of law.

"We have placed emphasis on voluntary conciliation — not coercion.

"The amendment of our substitute leaves the investigation and conciliation functions of the Commission substantially intact.

"Section 706(e) provides for suit by the person aggrieved *after conciliation has failed.*" (Emphasis supplied.)[32]

The plaintiffs ignore the legislative history relating to the compromise between the Senate and the House and the adoption of the legislation in its present form. All of this history was relied upon by Chief Judge

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[31]110 Cong. Rec. 12690, 14190, (June 4, 17, 1964).

[32]110 Cong. Rec. 13088, 14443, 12722-12723 (June 4, 9, 1964).

Lynne in the Dent case,[33] and I cannot overlook the fact that this court heretofore indicated approval of *Dent* in *Mickel v. South Carolina State Employment Service*, 377 F.2d 239, 242 (4 Cir. 1967) in which decision two of the judges in the instant cases joined. We there stated:

> "The decision in *Dent, supra* * * * painstakingly discusses the legislative history of this portion of the Civil Rights Act. The opinion presents overwhelming authority culled from Congressional committee reports and the statements of key legislators to support the conclusion that Congress intended that persons claiming discrimination in employment should first exhaust their remedies within the Commission created for that purpose. Furthermore, the original bill contained a clause permitting the bringing of civil actions prior to seeking conciliation but this provision was eliminated by a House amendment in order to insure that conciliatory efforts would be made."

I again express my approval of the decision in *Dent* and its analysis of the legislative history. That decision was relied upon heavily by the court below. Now, the plaintiffs incorrectly assert that most of the items of legislative history relied upon by the district court and by the court in the *Dent* case were from the House "at a time when the bill still provided for judicial enforcement only at the suit of the Commis-

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[33]Dent v. St. Louis-San Francisco Ry. Co., 265 F. Supp. 56 (N.D. Ala. 1967).

sion," a provision in the bill as originally drafted. It would appear that the statements from the Senate as hereinabove set forth demonstrate that the arguments advanced by plaintiffs are without merit. It cannot be doubted that the Dirksen compromise was "a further softening of the enforcement provisions of Title VII,"[34] and placed "greater emphasis * * * on arbitration and voluntary compliance than there was in the House bill,"[35] Senator Case, a co-manager of the bill in the Senate, stated:

> "There could be no claim of harassment in as much as the enforcement procedure has been whittled down to the minimum."[36]

Therefore, it would be illogical to construe the compromise as placing less emphasis on voluntary compliance than did the House bill.

The plaintiffs' argument that the Dirksen compromise in the Senate was intended to permit suit prior to conciliation efforts, thereby reversing the procedure admittedly spelled out in the House bill, is illogical in two more respects. First, the compromise grew out of the need of the supporters of the bill in

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[34] 110 Cong. Rec. 12595 (June 3, 1965) (Senator Clark).

[35] 110 Cong. Rec. 15876 (July 2, 1964) (Rep. Lindsay).

[36] 110 Cong. Rec. 13081 (June 9, 1964); and Senator Humphrey stated that the Senate changes "gave increased emphasis to methods of securing voluntary compliance." 110 Cong. Rec. 12707 (June 4, 1964); and "We have placed emphasis upon voluntary conciliation—not coercion." 110 Cong. Rec. 14443 (June 19, 1964).

the Senate to invoke the cloture procedure. In order to obtain the required number of votes the House bill had to be softened. "The necessity for and difficulties in obtaining the two-thirds vote for cloture must be borne in mind in any attempt to understand the amendments to the bill adopted in the Senate and particularly the amendments to Title VII.[37] Second, if it had been the intent of the Senate to allow resort to court action prior to conciliation efforts, this could easily have been accomplished by reinserting the "in advance thereof" clause which was deleted in the House. The Senate, however, made no such insertion and, even more to the point, there are no statements from the Senators to indicate that the Senate bill was to be construed as if the "in advance thereof" clause had been inserted. It having been the recognized intent of the House to insure conciliation efforts before resort to court action it would be contrary to logic to imagine that this intended procedure was eliminated in the Senate by inference and without one word of explanation. Thus, when the Senate bill went back to the House for approval, it was explained by members of the House Judiciary Committee that:

> "There is greater emphasis in the Senate amendments on arbitration and voluntary compliance than there was in the House bill."[38]

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[37]Berg, Equal Employment Opportunity Under The Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 66 (1964).

[38]110 Cong. Rec. 15876 (July 2, 1964) (Rep. Lindsay).

"The bill comes back to the House tempered and softened."[39]

Adverting to the Senate proceedings, it was pointed out that the compromise proposal was based upon the accumulated experience of twenty-five states which have fair employment practices laws. Senator Javits assured the Senate that fears about the procedure of the compromise were not warranted because "in the 13 industrial states of the north, since the first law of this kind was passed, there have been 19,439 cases" and "only 18 have actually gone to court." (110 Cong. Rec. 13089-13090, June 9, 1964). As hereinbefore shown, Senator Saltonstall referred to the experience in Massachusetts as gratifying, indeed. The Senate obviously relied heavily upon such assurances that employers would not be harassed with frivolous litigation and that the federal courts would not be flooded.

The experience of the states, showing that conciliation is a successful means of obtaining voluntary settlement of complaints of discrimination in employment, is not to be lightly regarded. This court has already recognized that conciliation provides a means for the Commission to settle the matter "in an atmosphere of secrecy without resorting to the extreme measure of bringing a civil action in the congested federal courts," *Mickel, supra* 377 F.2d 239, 241. The statute, § 706(a), 42 U.S.C. § 2000e-5

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[39]110 Cong. Rec. 15893 (July 2, 1964) (Rep. McCulloch).

(a), directs that nothing said or done and as a part of "such endeavors" may be made public by the Commission without the written consent of the parties or used as evidence in a subsequent proceeding. This section also makes it a misdemeanor for any employee of the Commission to divulge such information. If voluntary compliance with these statutes is the first objective, and I think it is, the prospect of willing cooperation is greatly diminished by a suit instituted prior to conciliation efforts on the part of the Commission. Publicity with respect to complaints of discrimination might involve substantial dangers to industrial peace. The pressures, publicity and adversary attitudes which naturally follow the institution of a law suit can make willing cooperation difficult, if not impossible. Congress intended in my view, that the Commission should make the effort to eliminate alleged unlawful employment practices by conferences with the employer, by persuasion and by conciliation. Such is the sensible approach before authorizing the aggrieved person to plunge into litigation. I am persuaded that it is this approach which Congress intended and for which it made provision.

It is true that the courts are not in accord in their interpretation of these statutes, as pointed out in the majority opinion. As these disagreements began to appear the Commission may have been impelled to review and reconsider the procedures which it had undertaken to follow. In the instant cases the notification was sent to each plaintiff that he could resort

to court action prior to any conciliation effort by the Commission. Up to that time the Commission had issued no formal or official interpretation of the requirements of the statute with regard to whether an effort to conciliate must precede the issuance of such notice. But in November 1966 the Commission, perhaps entertaining some doubt as to the legality of its procedure employed in these and other cases, issued a Regulation stating that it "shall not issue a notice * * * where reasonable cause has been found, prior to efforts at conciliation with respondent," except that, after sixty days from the filing of the charge, the Commission will issue a notice upon demand of either the charging party or the respondent. (29 C.F.R. § 1601.25a).

If inability to undertake conciliatory procedures be attributable solely to a "heavy case load," as asserted by the Commission, this would not be the first instance where statutes could not be followed or enforced because of lack of necessary implementation. If sufficient funds were not appropriated to permit the Commission to function as intended this situation can and should be corrected, but this is a problem which cannot be solved by the courts. Claims of resulting unfairness to allegedly aggrieved persons have been made in this and other courts if conciliation effort, though unsuccessful, is held to be a prerequisite to resort to the courts. It is clear that Congress intended to protect aggrieved persons against violations of their civil rights but it is clear

also that Congress did not lose sight of the unfairness which would result to parties against whom charges are filed if they could be brought into court without the conciliation step.[40]

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[40] *See* Dent v. St. Louis-San Francisco Ry. Co., 265 F. Supp. 56, 62 (N.D. Ala. 1967).

ORDER OF DISTRICT COURT

IN THE

District Court of the United States

FOR THE WESTERN DISTRICT OF

NORTH CAROLINA

CHARLOTTE DIVISION

Charles W. Walker, *Plaintiff* vs. Pilot Freight Carriers, Inc. *Defendant*	Civil Action No. 2167 Order

THIS CAUSE coming on to be heard before the undersigned, United States District Judge, and being heard upon defendant's Motion to Dismiss the action for lack of jurisdiction on the grounds that prior to the institution of the action there was no attempt or endeavor made by the Equal Employment Opportunity Commission to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion as required by the Civil Rights Act of 1964; and, after considering the pleadings, admissions, briefs and oral argument of counsel, the Court is of the opinion that resort to the remedy of conciliation is a jurisdictional prerequisite to the right to file and maintain a civil action under the Civil Rights Act of 1964, and

that since there was no such effort made, the Motion should be allowed.

IT IS, THEREFORE, ORDERED that the action be and the same is hereby dismissed.

The foregoing Order is based upon a Memorandum of Decision filed in the case of Ray Johnson v. Seaboard Air Line Railroad Company, copy of which Decision is attached hereto.

This the 25th day of January, 1968.

/s/ WOODROW W. JONES

United States District Judge

MEMORANDUM OF DECISION IN RELATED CASE
IN THE

District Court of the United States

FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

Ray Johnson,	*Plaintiff*	Civil Action No. 2171
vs.		
Seaboard Air Line Railroad Company, a corporation.	*Defendant*	

MEMORANDUM OF DECISION

The plaintiff brought this action on his own behalf and on behalf of other Negro citizens similarly situated, under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Section 2000 e-5, against the defendant alleging racial discrimination in terms and conditions of employment against himself and the class which he claims to represent, and charging that he was discriminatorily discharged from employment. The defendant has moved to dismiss the action for lack of jurisdiction on the grounds that prior to the institution of the action there was no attempt or endeavor made by the Equal Employment Opportunity Commission to eliminate any such alleged unlawful employment practice by informal methods of confer-

ence, conciliation, and persuasion as required by the Act.

The issue before this Court is whether it is a prerequisite to the institution and maintenance of a civil action under the Civil Rights Act that there be compliance with the direction of 42 U.S.C.A. Section 2000 e-5 (a) which reads in part as follows:

"Whenever it is charged in writing under oath by a person claiming to be aggrieved, . . . that the employer . . . has engaged in unlawful employment practice, the Commission shall furnish such employer . . . with a copy of such charge and shall make an investigation of such charge . . . If the Commission shall determine after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion . . ."

The facts necessary for this decision are not in dispute and may be briefly summarized. The plaintiff in this action filed his complaint with the Equal Employment Opportunity Commission on January 14, 1966, alleging a violation of the Act, and by order dated July 18, 1966, the Commission found "There is reasonable cause to believe that the respondent violated Title VII of the Civil Rights Act of 1964 in dismissing the charging party from its employ." That by letter dated August 8, 1966, the Commission advised the defendant in pertinent parts, as follows:

"This will inform you that, after investigation, the Equal Employment Opportunity Commission has determined that there is reasonable cause to believe that you have engaged in an unlawful employment practice within the meaning of Section 703 of the Civil Rights Act of 1964. A copy of the Commission's decision is enclosed.

"A Conciliator appointed by the Commission will contact you soon to discuss means of correcting this discrimination and avoiding it in the future.

". . . Since the charges in this case were filed in the early phases of the administration of Title VII of the Civil Rights Act of 1964, the Commission has been unable to conduct a conciliation during the 60-day period provided in Section 706. The Commission is, accordingly, obligated to advise the charging party of his right to bring a civil action pursuant to Section 706(e).

"Nevertheless, we believe it may serve the purposes of the law and your interests to meet with our Conciliator to see if a just settlement can be agreed upon and a law suit avoided.

"We are hopeful that you can cooperate with us in achieving the objectives of the Civil Rights Act and that we will be able to resolve the matter quickly and satisfactorily to all concerned."

That no Conciliator from the Commission called upon the defendant and no effort at any time has been made by anyone to conciliate this matter. Upon

a hearing on the Motion, the Court inquired of plaintiff's counsel whether the Court could assist in a conciliation of the matter and was advised that no such assistance was desired.

42 U.S.C.A. Section 2000 e-5(e) provides in part as follows:

"If within thirty days after the charge is filed with the Commission or within thirty days after the expiration of any period of reference under sub-section (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to seek voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved . . ."

Several District Courts have recently reached different conclusions about jurisdictional prerequisites for institution of an action under Title VII of the 1964 Civil Rights Act.

The cases of Quarles v. Philip Morris, Inc., 271 F. Supp. 842, E.D. Va. April 11, 1967; Evenson v. Northwest Airlines, Inc., 268 F. Supp. 29, E.D. Va., March 17, 1967, and Moody v. Albemarle Paper Co., 271 F. Supp. 27, E.D.N.C. July 5, 1967, seem to hold that an attempt or endeavor at conciliation by the Commis-

sion is not a prerequisite to the institution of a civil action by an aggrieved party. However, the factual situation in these cases is somewhat different from the case at bar. In the Quarles case the Commission stated it had been unable to undertake "extensive" conciliation and it would make additional efforts. In the Evenson case the Commission advised the aggrieved party that conciliation efforts had failed, and in the Moody case the Commission reported that voluntary compliance within sixty days from receipt of the complaint by the Commission had not been effected. In the case at bar the Commission reports that no effort, endeavor or attempt was made to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

The words of the statute are clear that "if the Commission shall determine . . . there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Is there any doubt the Congress, the legislative body our government, charged the Commission which it created, with the duty to endeavor to eliminate the alleged wrongful practice by informal methods of conciliation and persuasion? After this effort is made by the Commission it then becomes its duty to report its failure to the aggrieved party who may then institute action in court. The language of the Act clearly pro-

vides that if within sixty days after the charge is filed, "the Commission has been unable to obtain voluntary compliance . . . the Commission shall so notify the person aggrieved and a civil action may . . . be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . ."

The legislative branch of our government in passing this measure had some purpose in the use of this language. There is no doubt the Congress intended this procedure be followed in these cases. Did it mean that the court action could not be maintained before this procedure was completed?

This Court has done considerable research on this question and has had the benefit of exhaustive briefs from the attorneys on both sides and has reached the conclusion that Congress intended that an endeavor at conciliation be a prerequisite to the institution of a civil action under this Act.

The case of Dent v. St. Louis S.F. Railway Co., 265 F. Supp. 56, N.D. Ala. March 10, 1967, clearly holds that conciliation attempts were a "jurisdictional prerequisite to the institution of a civil action under Title VII and that actions instituted without this prerequisite must accordingly be dismissed." The court in the Dent case discusses in detail legislative history of this portion of the Civil Rights Act and presents overwhelming authority gathered from the Congressional Committee reports and the debate on the floor of the House and Senate. The most convincing evidence to support this contention is that the bill as

reported to the House from the Judiciary Committee contained a clause which would have permitted the institution of a civil action before conciliation efforts, but that this clause was eliminated from the bill during the debate on the floor by an amendment offered by Representative Celler, Chairman of the House Judiciary Committee and author and introducer of the measure. Chairman Celler offered the amendment and stated "the language is stricken out to make certain that there will be a resort by the Commission to conciliation efforts before it resorts to a court for enforcement." While the bill at this stage permitted the action to be brought only by the Commission, it was amended further in the Senate to permit the action to be brought by the aggrieved party. Everybody admits that the House Amendment made the conciliation attempt a condition precedent to the Commission's right to bring action, but it is argued that when the Senate substituted the "person aggrieved" for the Commission as the party authorized to bring the civil action, the necessity for a conciliation attempt as a prerequisite to the institution of an action was eliminated. The Court in the Dent case held that this argument was entirely contrary to logic and to legislative intent.

In the case of Mickel v. South Carolina State Employment Service, 377 F. 2d 239 (4th Cir. 1967), the Court after quoting with approval the Dent case, said: "It seems clear from the language of the statute that a civil action could be brought against the respondent

named in the charge filed with the Commission only after conciliation efforts had failed, or, in any event, after opportunity had been afforded the Commission to make such efforts." In the case of Stebbins v. Nationwide Mutual Insurance Company, 382 F. 2d 267 (4th Cir. 1967), the Court said: "Congress established comprehensive and detailed procedures to afford the Equal Employment Opportunity Commission the opportunity to attempt by administrative action to conciliate and mediate unlawful employment practices with a view to obtaining voluntary compliance."

In the case of Choate v. Caterpillar Tractor Co. 274 F. Supp. 776, (S.D. III. November 1, 1967), the Court reviewed the cases of Dent, Mickel, and Hall v. Werthan Bag Corp. 251 F. Supp. 184 (M.D. Tenn.), and said: "All of those decisions are considered as consistent in holding that resort to the remedy of conciliation is a jurisdictional prerequisite to the right to file a civil action. This Court agrees with that construction of the Act. The plain language of the statute requires it, as does the established principle that statutes creative of remedies not known to the common law are to be strictly construed . . . Under such a statute, the right of action itself is conditioned upon strict compliance with all the conditions imposed by the statute as a basis for assertion of a right of redress by resort to court processes."

After the case at bar was instituted and as an apparent result of the question being raised in several

suits throughout the country with some adverse decisions, the Commission changed its policy and issued new regulations pertaining to conciliation. The new regulation provides that the Commission shall not issue a notice where "reasonable cause has been found, prior to efforts at conciliation with respondent." This change in policy by the Commission after this question had been raised and passed upon by the Courts, clearly indicates the Commission recognized its responsibility under the law to attempt conciliation before advising the aggrieved party to institute action.

This Court is of the opinion and so holds, that Congress intended that conciliation efforts be made prior to the institution of civil actions and that this is a jurisdictional prerequisite to the right to file a civil action. Since the Commission made no effort or endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion in this case, the same must be dismissed. The motion of the defendant is therefore allowed.

This the 25th day of January, 1968.

/s/ WOODROW W. JONES

United States District Judge